UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NAPLETON 1050, INC. D/B/A NAPLETON CADILLAC OF LIBERTYVILLE

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS AFL-CIO

and

WILLIAM GLENN RUSSELL II, an Individual

Cases: 13-CA-187272
13-CA-196991
13-CA-204377

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

Respectfully Submitted:

By: James F. Hendricks

James F. Hendricks, Jr.
Michael P. MacHarg
Freeborn & Peters, LLP
311 S. Wacker Drive, #3000
Chicago, IL 60606
Counsel for Respondent

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I. BACKGROUND

Respondent is one in a series of auto dealerships owned and operated by brothers, Bill and Paul Napleton. (Tr. 216, 329) The dealership in the case *sub judice* is located in Libertyville, IL. This dealership became a member of the Napleton organization as the result of an asset purchase from Weil Cadillac. (ALJD p.4) Napleton retained most of Weil's workforce, including Service Director Scott Inman and office manager Pam Griffin. (ALJD p.4) Additionally, Respondent retained many of the technicians employer by the predecessor, even though it was not required to do so under the explicit terms of the purchase agreement. (ALJD p.4, Tr. 329)

The organizing campaign that is the subject of these proceedings was initiated by the filing of the union's RC petition on September 23, 2016. (ALJD p.4) The employer's response to the campaign was three lunch meetings with employees to discuss the employer's view on the detriments of unionization. (ALJD p.4) The union won the election which was conducted on October 18, 2016. (ALJD p.4)

The employment actions which are the subject of these exceptions took place the week after the election. The first employment action was the lay-off of a journeyman technician, David Geisler. The other job related action was the issuance of a COBRA notice to William Russell, who had been employed by the predecessor as a journeyman technician. Notwithstanding the fact that Russell submitted paperwork to Respondent regarding his medical status, he was never of the payroll of Respondent and never worked a single minute for that enterprise. (Tr. 63, 80, 339, 386)

After the union's election victory, the parties commenced bargaining for a collective bargaining agreement. (ALJD p.14) In August 2017, the union struck a multi-employer bargaining association known as the Chicago New Car Dealer Committee (NCDC). (ALJD p.14) Respondent's store that is the subject of this litigation was not a member of the NCDC, but

did have six other stores that are members of the NCDC. (ALJD p.14) Notwithstanding the fact that the Cadillac store was not a member of the NCDC, the union struck this facility as well. (ALJD p.14) Respondent was able to continue operations utilizing permanent replacements.

II. TRIAL PROCEDURE

ALJ Goldman committed numerous procedural errors which tremendously prejudiced Respondent and its counsel.[1] Cumulatively, the ALJ's errors deprived Respondent of its right to Due Process. While it would be extraordinary, Respondent is entitled to a new hearing *de* novo, before a different, impartial ALJ. *International Longshoreman's Association, Local 28 (Ceres Gulf, Inc.)* 366 NLRB No. 20 (2018) (finding the Board has authority to vacate and remand a case for hearing *de novo* after ALJ error).

The three errors for consideration are: the exclusion of Respondent's counsel for the duration of the hearing under the guise of sequestration[2]; the refusal to permit Respondent's counsel to adequately review *Jencks* material;[3] and refusing to issue a subpoena sanction against an individual who intentionally disregarded a properly served subpoena.[4] Additionally, the transcript was replete with incidents of subtle bias and there are a number of injudicious comments it the Decision.[5]

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[1] Respondent's Exception 34 notes that the Region was investigating a charge that was integrally intertwined with the subject matter of this hearing. This became abundantly clear during cross-examination of Respondent's CFO, when Counsel for the General Counsel attempting to engage in a fishing expedition to investigate the unfair labor practice charge. (Tr. 369) The Region elected to proceed to a hearing and the ALJ denied Respondent's motion to await the investigation for consolidation purposes. The other unfair labor practice allegations were dismissed on February 23, 2018 and are presently awaiting a determination from the Division of Appeals.

[2] Exception 7

[3] Exception 32

[4] Exception 33

[5] For instance, Jopes testified regarding his experience with layoffs during the tenure of his experience. (Tr. 349-351) On cross-examination he was explaining how the situation with Russell was unique, because this was the "one and only time" where it was an in between situation after the union election, but prior to reaching a collective bargaining agreement. Counsel for the General Counsel then immediately intentionally mischaracterized that testimony, stating that was the "one and only time" Jopes had been

Relying on *Greyhound Lines* 319 NLRB 554 (1995), the ALJ sequestered Respondent's primary counsel. Respondent did take a Special Appeal, which was not ruled upon until the hearing had closed. Nonetheless, the ALJ's sequestration order constitutes a clear abuse of discretion and flies in the face or routine Board practice. Due to the very nature of Board practice, attorneys routinely have to testify in administrative proceedings, particularly in bargaining cases, as was the case here. Respondent's counsel had an extremely limited role in this case, but was denied participation in the entire proceeding. This decision denied Respondent to its chosen counsel and without good reason. Certainly a more reasonable decision would have been to allow Hendricks to participate, and consider what he heard at the hearing in assessing his overall credibility. That more deliberate approach was denied, and the genie cannot be put back into the bottle.

A second error by the ALJ is much more cut and dried. Respondent always timely requested witness statements, pursuant to *Jencks*, 18 U.S.C. 3500 (1957), for review prior to cross-examination. The NLRB Rules and Regulations specifically authorize release of witness statements for cross-examination purposes. NLRB Rules and Regulations Section 102.118(b)(1) The generally accepted practice is to permit counsel to review *Jencks*' material **for the duration of the hearing.** This practice has been recognized by the Board. In *Wal-Mart Stores, Inc.* 339 NLRB 64 (2003), the Board stated that an ALJ does not have discretion to allow retention of statements beyond the close of hearing. However, the Board explicitly recognized that as an "operating procedure" counsel may retain the copy throughout the hearing to use for any legitimate trial purpose, but upon the close of the hearing he will be expected to return the copy

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involved in a layoff. (Tr. 352) Respondent's counsel attempted to correct the record, but was prevented from doing so. (Tr. 352-353) Incredibly, Counsel for the General Counsel whined that such objection was "coaching" a notion with which the judge seemed to agree, and stated the record would be corrected on redirect. (Tr. 353) When counsel for Respondent attempted to clarify the record, Goldman became belligerent and attempted to make himself a party to the proceedings. (Tr. 380-381)

provided. *Id.* at 65, fn.3, *1970 Committee Reports*, Sec. on Labor Relations Law, American Bar Association, Vol. II, p.12. Judge Goldman conferred upon himself the "discretion" to determine the appropriate time for the return of the witness statements. (Tr. 161-162) In fact, the word "discretion" **does not appear** in Section 102.118(b)(1). The purpose of allowing extended review is for a thorough and proper cross-examination. Many of these statements had been in the possession of Counsel for the General Counsel for over a year. Allowing Respondent's counsel ten minutes to review a lengthy affidavit does not adequately insure a proper and thorough cross-examination. This point becomes pointedly highlighted in view of the judge's decision to exclude co-counsel for the duration of the hearing. In light of *Wal-Mart*, the absence of discretionary language in the Rules and Regulations, this is an appropriate time for the Board to issue a bright line rule permitting counsel to keep an affidavit until the close of hearing for legitimate purposes.

A final trial procedural error arose regarding a subpoena properly issued to Joe Schubkegel, a union member and trial witnesss. (Er. Ex. 2) The record stipulation indicates that the subpoena was properly served, with a fee and that no petition to revoke or modify was made. (Tr. 183-184) The ALJ did not issue any type of subpoena sanction, notwithstanding the fact that the recipient did not make any effort to revoke or modify the subpoena. Board law on this issue is crystal clear, the failure to issue a subpoena sanction is an abuse of discretion because of the recipient's failure to revoke the subpoena. *Detroit Newspapers Agency*, 326 NLRB 700, 751 n.25 (1988), enf. denied on other grounds 216 F.3d 109 (D.C. Cir. 2000). Upon remand, any testimony regarding the toolbox should not be permitted. Alternatively, any testimony regarding the toolboxes should be stricken from the record and the unfair labor practice allegations regarding the toolbox be dismissed.

III. LAYOFF OF DAVID GEISLER

The ALJ's decision is erroneously predicated upon the judge's finding that the timing is suspicious, indirect findings of animus bordering on the convoluted, and willful disregard of independent factors proving that the layoff was solely for legitimate business reasons. The judge specifically found that this was a "dual motive" case and that the Respondent had legitimate grounds for a layoff. (ALJD p.23) The judge's analysis then concludes that the Respondent did nothing to show that it would have taken this action in the absence of union activity. (ALJD p.24) This is objectively incorrect.

The judge's decision fails to take notice of the fact that on the same day that Geisler was laid off, Respondent also laid off a body shop manager and and administrative employee who served as the employer representative at the election. (Tr. 243) A layoff of this magnitude plainly reflects that the Respondent was engaged in cutting costs for legitimate business purposes, not for any improper retaliatory purposes. Had this simple fact been recognized, it would require a logical leap that Respondent laid off a management employee and its company representative at the election in an effort to cover up ill motivation for laying off Geisler.

The judge explains his decision largely on his conclusion that the "decision was made three days after the election." The judge goes so far as to claim that Jopes is "making up" a timeline for the layoff decision. (Exception 13) Even a cursory examination of the facts belies this conclusion. Candidly, the three main witnesses for Respondent (CFO Jopes, Service Manager Inman and Fixed Operations Director Renello) were frustratingly vague in their testimony developing the timeline of the layoff decision. The judge disregarded the generalized testimony of all three witnesses that the layoff had been under consideration almost from the inception of the purchase (Tr. 234-237, 334-336, 409-425, Exception 23) Specifically, CFO Jopes explicitly stated that they began analyzing technicians based upon the weekly payroll. (Tr.

334, Exception 22) The judge then specifically cherry picked a single piece of evidence, that CFO Jopes contacted his attorney for guidance regarding a layoff, to conclude that the layoff decision was made three days after the election. (ALJD p.22, Exception 12)

There are several indicia that support the admittedly vague testimony that a layoff was being contemplated for a much more significant time period. Most critically, Counsel for the General Counsel's own documentary submission supports the objective fact that Geisler was the lowest performing journeyman technician over virtually any time period the Respondent could have reviewed. (GC Ex. 10) The unrebutted testimony of Respondent's management witnesses indicated that an acceptable business baseline for journeyman technicians is 40 hours per week. (Tr. 235-36, 333) Quite simply, **none** of the technicians was meeting this threshold after the purchase. Logically, Respondent concluded that a layoff would allow the hours off the laid-off technician to be distributed among the other technicians, which should result in all of the remaining technicians meeting their targets.

Another key indicator that the layoff was not pretextual is the fact that the union did not object to the layoff decision, but rather focused exclusively on the selection criteria. (Tr. 111, 489) If there was anything in the least bit suspicious about Respondent's decision to layoff an employee, it stands to reason that a newly elected and powerful union would have objected strongly and loudly to the Respondent's announcement of a layoff. The union's silence on the issue is instructive. While the parties undertook to negotiate over productivity versus seniority as the sole criterion for the layoff, the evidence demonstrates to an absolute objective certainty that the lowest performing technician was selected for layoff. No party raises any argument that the criteria were not followed or that the target was moved to punish a particular individual. Rather,

Respondent tried to improve its profitability and elected its lowest performing journeyman for layoff.[6]

Lastly, in reaching the conclusion that the job actions against Geisler and Russell were unlawful, relies upon a controversial reading of the seminal *Wright Line* decision.[7] The decision correctly establishes that under *Wright Line,* the elements to show that a decision was unlawful are union activity, employer knowledge of the activity and animus on the part of the employer. (ALJD p.17) This showing can be rebutted by demonstrating that [the same employment action] would have taken place in the absence of protected conduct. (ALJD p.17; *Wright Line*, *supra,* at 1089)

The "controversial" reading of *Wright Line* is whether counsel for the General Counsel is required to show nexus to the employment action and protected activity, or whether a generalized showing of animus is sufficient to establish a violation. Specifically, the judge found that the actions against Geisler and Russell were retaliated against to punish union activity in general. (ALJD p.18) This reasoning is inadequate legally and logically.

Wright Line requires the General Counsel as part of its initial burden, to prove the existence of a nexus between protected activity and the particular decision alleged to be unlawful. The Board explicitly characterized the General Counsel's burden as requiring proof that the challenged adverse action was motivated by antiunion animus. The Board stated that the General Counsel must, as an initial matter, make "a *prima facie* showing sufficient to support the inference the protected conduct was a motivating factor in the employer's decision. 251 NLRB at 1089. Generalized antiunion animus does not satisfy the initial *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus. *Roadway*

[6] Further undercutting any inference of discriminatory motive is the fact that Respondent offered Geisler his job back when business conditions improved. (Tr. 427)
[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Express, 347 NLRB 1419, 1419 fn.2, 1422-1424 (2006) (evidence of union's generalized animus towards financial core payers insufficient under the circumstances to sustain General Counsel's burden of proof); *Atlantic Veal & Lamb, Inc.* 342 NLRB 418, 418-419 (2004) (finding that employer harbored animus against union activity, but that there was insufficient evidence to establish that animus against employee's union activity was a motivating factor in the failure to recall him), enfd. 156 Fed. Apps. 330 (D.C. Cir. 2005). In general, it is the Board's duty in all cases that turn on motivation "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect their employment. *Wright Line, supra,* 251 NLRB at 1089.

The tenuous nexus established by Counsel for the General Counsel is the testimony that Geisler alleges that employees should "not have voted that way." (ALJD p.24, Exception 21) Standing alone, this is insufficient to support any nexus between animus and the layoff. From a purely business perspective the layoff makes perfect sense, each and every technician was failing to meet their targeted hours for months on end. (Exception 24) While Respondent's decision making was far from perfect, it is not required to be. In fact, the Act does not require perfection, rather the Act only requires that employees not be discriminated against because of their union activities. *Libertyville Toyota,* 360 NLRB 1298, 1307 (2014) (Member Miscimarra dissenting, "But perfection is not possible in this world, particularly in the often-pressurized atmosphere of a car dealership, and the Act does not require an employer to handle its personnel matters perfectly.) Indeed, Respondent's handling of this layoff was imperfect. It did not chronicle the precise deliberation of technician hours in a journal, backed by charts and graphs and emails and memos. During the chaotic times immediately following a purchase, immediately faced by a union organizing challenge, the Respondent operated its business the best it could under the

circumstances. If defies credulity to think that this employer, disappointed by a union election, chose to exact its revenge by laying off an employee, who admittedly engaged in no open union support. Certainly if revenge was being calculated, it would have been much more open, notorious and directed at a union supporter. Geisler was not laid off in retaliation for his union support and as a matter of law, and the related exceptions should be granted, and the judge's decision reversed.

IV. RUSSELL

The handling of Russell, while sloppy, demonstrates an example of a case that if it were retaliation, would be utterly pointless and ineffectual. What benefit could Respondent possibly hope to derive from this "generalized animus" in laying off/firing a former employee who had never worked for Respondent, never openly supported the union -and was rarely, if ever, seen by any of his contemporary co-workers. There is simply no plausible defense to the conclusion that Russell was terminated to punish others for their support of the union. Russell was never working for the Napleton group. He was never at work to support the union, never at work to engage in union activities and retaliating against him would be virtually invisible.

The judge credited Russell's testimony that when he came to pick up his tools, Inman pointed to another employee and blamed him for starting the union organizing. Surely, an employer bent on engaging in activity destructive of employee rights would select someone visible for their revenge, an employee known by his co-workers to support the union and now identified as one responsible for union activity. Yet, the judge has us believe that the employer turned its vengeance on this third party employee, one that it had literally almost no engagement with on an employment basis.

(Exception 8) A critical flaw in the judge's reasoning centers upon his crediting the testimony of Russell regarding an August 2016 conversation which allegedly took place between

Russell, his wife, Inman and another employee named John Soffietti. First and foremost, Counsel for the General Counsel did not call Mrs. Russell to the stand to testify.[8] This egregious oversight and omission is fatal to the theory that any conversation relating to the union took place at this time. An adverse inference is warranted only when the missing witness was peculiarly in the power of the other party to produce. *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1048 fn. 8 (7th Cir. 2006). Plainly, Mrs. Russell is peculiarly in the power of Counsel to the General Counsel, and it can be presumed she would testify favorably on behalf of her spouse. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988) (adverse inference appropriate where party fails to call a witness reasonably presumed to be favorably disposed to that party.) The suspicious non-appearance of Mrs. Russell must be found to eliminate any conversation centering around union activity in August 2016.

Soffietti's testimony clearly and articulately stated that there was no discussion regarding unions between Inman, Russell and Mrs. Russell. (Tr. 200-203). When pressed on cross-examination, Soffietti made it plain that it would have impossible for him not to hear the conversation, based upon his detailed description of the room's size. (Tr. 207) Accordingly, the judge was incorrect in stating that Soffietti's failure to hear union discussions does not rebut Russell's testimony. (Exception 11) Soffietti's emphatic testimony, coupled with the failure of Mrs. Russell to testify, in fact fully rebuts Russell's testimony. (Exception 9)

This conversation is the only possible and plausible means that Counsel for the General Counsel has for demonstrating employer knowledge of Russell's union activities. Russell was an unknown entity to all of Napleton's personnel. Although Inman knew him, in August 2016 Inman was unaware of any union activities whatsoever. The only way Russell was able to recall

[8] Exception 20

union activity was under the guidance of leading questions from Counsel for the General Counsel.[9] Respondent called a neutral witness to the stand, John Soffietti, who denied that Russell and his wife discussed the union in any manner. (Tr. 204-207) Without crediting this conversation, Counsel for the General Counsel is unable to demonstrate employer knowledge of Russell's "union activities."

Similar to the situation with Geisler, an appropriate application of *Wright Line* is unavailing for Mr. Russell's case. Counsel for the General Counsel cannot even establish knowledge of union activity, because there was none. The judge incorrectly notes that the prong of *Wright Line* is satisfied by employees petitioning for and electing union representation. (ALJD p.18) As discussed in Section III, *supra*, Counsel for the General Counsel needed to establish union activity by Russell, knowledge of that activity by the employer and some nexus between the activity, knowledge and the issuance of Russell's COBRA letter.

With regards to why Russell was ultimately removed from the insurance rolls by COBRA notice, *Occam's Razor* is applicable - the employer chose to stop paying for insurance for an individual not in their employ. (Exception 19) The judge's finding that questions surrounding Russell's motivations amount to nothing more than "ad hominem" or non-sequitur attacks on Russell misses the mark entirely. (ALJD p.21) An ad hominem attack, Latin for "to the man" is defined as a fallacious argumentative strategy whereby genuine discussion is avoided by

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[9] Judge Goldman struggles mightily with the notion of leading questions. In his decision he found that Inman was led to testify that he was unaware of union activity prior to receiving the petition. (Exception 10) The question posed to Inman was, "Were you aware of union activity prior to receiving the petition?" (Tr. 402) According to the great and learned Wigmore, a leading question instructs the witness how to answer or puts into his mouth words to be echoed back. 3 *Wigmore on Evidence* (Chadbourne Rev. 1970) 154, Section 769. Plainly "were you aware" does not instruct the witness, nor put words into his mouth. Conversely, Judge Goldman was apparently untroubled by questions posited by Counsel for the General Counsel which were plainly leading. (Tr. 81-83)

attacking the character, motive or other attribute of the person associated with the argument, rather than the substance of the argument itself. *Merriam-Webster*, 2013.

Thus, far from attacking the man, pointing out that he is simultaneously maintaining a claim for discrimination does raise a question regarding Russell's motives, even if the judge chooses not to rely on such specious behavior. Similarly, the union's not filing the charge on Russell's behalf does raise some question regarding Russell's credibility and support for the union, because this is a union that zealously defends and advocates on behalf of its supporters. Ultimately, the decision correctly deduces that the case stands based upon Respondent's motives, but there is simply no probative evidence that Respondent's motives were unlawful or improper. (Exception 15)

While not dispositive, the conclusion that Russell was an employee is not supported by record evidence. (ALJD p. 21, Exception 16)[10] The decision notes that Respondent "hired every service technician of Weil without requiring an application or other affirmative steps to secure the job. (ALJD p. 21, Exception 17) This conclusion is fabricated from whole cloth, for there is zero record testimony, nor documentation regarding the employer's process for transitioning from the predecessor.[11] The erroneous payment of his insurance based upon documentation transferred from the predecessor does not confer on Russell employment status. So, although it is accurate to state that the COBRA notification sent to Russell separates any obligations to him, it is erroneous to call it an employment termination.

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[10] Exception 18

[11] This miraculous conclusion also appears where it is stated technicians were transferred from Weil to Napleton without having to interview or apply. (ALJD p.4)

A. Impression of Surveillance[12]

Part and parcel of the findings with respect to Russell include the legal conclusion that the employer unlawfully created the impression of surveillance. (ALJD p.24) The credited testimony is that Inman said to Russell, there is the guy that started all of this. This is an extraordinarily ambiguous statement. It was made in the context of moving toolboxes, which of course was the source of much contention. It was also made after Inman said, "I'm sorry about all of this." (Tr. 89, Exception 14) This reference could just as easily have referred to his sorrow at the man losing his job, while his wife is undergoing cancer treatment. The cases cited in the decision are all inapposite, as they all reference situations where specific mention of union activity or actions are mentioned.

V. REMOVAL OF TOOLBOXES

Although witness testimony became rather confused and convoluted regarding employee toolboxes, it is ultimately undisputed that during the first week of the strike employees were required to remove their toolboxes from Respondent's facility. The judge's decision concluded that requiring striking workers to remove their toolboxes violated the Act. (ALJD p.2, 26; Exceptions 4 and 26)

The judge's ruling disregards Respondent's private property rights, disregards its insurance policy and renders a struck employer as a personal guarantor of employee personal property. In support of his conclusion, the judge butchered a plain reading of the Respondent's personal property coverage. The judge stated that the testimony is "uncorroborated, undocumented and implausible."[13] (ALJD p.27, Exception 27 and 28) The problem is that the

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[12] Exceptions 3 and 25

[13] The judge further found Jopes's testimony regarding the toolbox "unbelievable." For reasons that are entirely unclear from the overall record, the tone of the Judge's decision is extraordinarily hostile to Jopes. He uses terms that are insulting, demeaning and frankly simply injudicious.

judge's conclusion are directly contradicted by the precise language contained in the insurance provision. (Er. Ex.1) The Federated policy does not cover property not being used in the business. The insurance policy introduced into evidence is the very definition of corroboration and documention.

With respect to the reasons for requiring the removal of the toolboxes at this facility, but not the other striking facilities, CEO Jopes's testimony was emphatically clear, but ignored in the judge's decision. Jopes testified that the toolboxes at the other facilities were governed by the respective collective bargaining agreements, creating a different situation. (Tr. 347) The judge described this explanation as "piffle." (Exception 29) Yet, the testimony establishes that different rules governed employer behavior at different facilities. Respondent was within its property rights to require employees to remove their tools. Notwithstanding volumes of sniveling testimony regarding the logistics involved in moving toolboxes, ultimately, all of the boxes were removed in a single day by a single company. (Tr. 180-181) The only difficulty in moving toolboxes is a question of motivation - when an individual is motivated to move their tools they can do so with a minimum modicum of effort.

Naturally, the employer's insurance coverage is not dispositive of the issue whether requiring the removal of the toolboxes violates the Act. That would create a situation where an employer could simply opt out of the Act by providing little to no coverage of property. However, the lack of coverage is instructive in reviewing the employer's motives for demanding the removal of the toolboxes. Respondent earnestly believed that keeping the toolboxes at the facility could create a host of difficulties with replacement employees soon to be occupying striking employees stalls. Everyone is in agreement that the tools are valuable and serve as a

technicians lifeblood. It is perfectly understandable that an employer would be interested in safeguarding those tools to avoid confrontation and upset at a later date.[14]

A. Notice to Strikers of Consequences for Striking

In the same document that informed the strikers they would have to remove their toolboxes, strikers were put on notice that they may be replaced, specifically, "If and when you are replaced, you will be notified. After you are replaced, should you make an unconditional offer to return to work you will be placed on a preferential hire list should an opening occur." (ALJD p. 28, Exceptions 5, 6 and 31) The decision cites a laundry list of cases - all of which address the **actual strikers and their replacements status as either temporary or permanent.** The issue regarding the status of the striker replacements was not before the tribunal, it was in fact the subject of the existing unfair labor practice investigation.

The lone case regarding statements cited by the judge support Respondent's position. The Board's policy is to "resolve in the employer's favor any ambiguity occasioned by a failure to articulate employees' continued employment rights when informing them about permanent replacement in the context of an economic strike. *In re Unifirst Corp.*, 335 NLRB 706, 707 (2001) The letter given to employees did not falsely create the impression that employees were replaced, it specifically stated, "[if] and when." It is utterly unreasonable as the judge concludes to read this letter as stating strikers will not be reinstated. There is no interpretation which

[14] The fact that an employee on disability and planning to return to work was not required to remove his tools is not probative. (ALJD p.28) In an absolutely bizarre finding, the judge found that Jopes found strikers not to be employees. (ALJD p.28, Exception 30) The troubling portion of this ruling is that Jopes's statement should not be part of the record because it was in response to an improper question - an objection the judge sustained. (Tr. 381) Obviously, an employee on disability is contemplated to return. Strikers may be in that contemplation as well, but the timing is more indefinite, they are subject to replacement and at some point they may choose not to return. Comparing strikers to employees on disability creates a false equivalency.

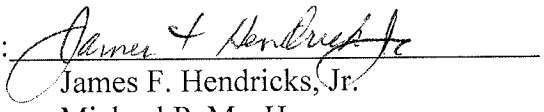
mandates or even permits such a conclusion. Accordingly, the notice to employees should be found to be lawful and the unfair labor practices alleged surrounding its contents dismissed.

VI. CONCLUSION

For all of the foregoing reasons, Respondents exceptions should be granted, the judge's order reversed and all allegations dismissed. Failing that, it is respectfully submitted that due to excessive procedural error, this case be remanded for a hearing *de novo*, before a different administrative law judge.

Dated: May 2, 2018 at Chicago, IL

Respectfully submitted,

By: 

James F. Hendricks, Jr.
Michael P. MacHarg
Freeborn & Peters, LLP
311 S. Wacker Drive, #3000
Chicago, IL 60606
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing **Respondent's Brief in Support of Exceptions to The Decision and Recommended Order of the Administrative Law Judge** was filed electronically with the National Labor Relations Board, Office of the Executive Secretary, before 5:00 p.m. on May 2, 2018.

Service of this **Respondent's Brief in Support of Exceptions to The Decision and Recommended Order of the Administrative Law Judge** was sent via electronic mail delivery on May 2, 2018 to the following:

Emily O'Neill
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 South Dearborn St., Suite 808
Chicago, IL 60604
Emily.o'neill@nlrb.gov

Kevin McCormick
National Labor Relations Board, Region 13
219 South Dearborn St., Suite 808
Chicago, IL 60604
Kevin.mccormick@nlrb.gov

Robert J. Kartholl
Law Offices of Robert J. Kartholl
9 East Irving Park Road
Roselle, IL 60172-2017
kartholl@hotmail.com

Rick Mickschl, Grand Lodge Representative
Local Lodge 701, International Association
Of Machinists and Aerospace Workers
113 Republic Avenue, Suite 100
Joliet, IL 60435-3279
rmickschl@iamaw.org

Brandon M. Anderson, Attorney
Jacobs Burns Orlove & Hernandez
150 N. Michigan Avenue, Suite 1000
Chicago, IL 60601-7569
banderson@jbosh.com

James F. Hendricks, Jr.

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